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DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBER 97-0203-ST
Sales and Use Tax
For Tax Years 1992, 1993, 1994 and 1995**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Credit for payment of sales tax

Authority: IC 6-2.5-3-4

Taxpayer protested the proposed assessment of use tax on tangible personal property acquired but the sales tax has been paid.

II. Imposition of tax on the sale of tangible personal property

Authority: IC 6-2.5-2-1, 45 IAC 2.2-4-2

Taxpayer protested the proposed assessment of use tax on the purchase of customized art work.

III. Promotional Material stored in Indiana for distribution outside Indiana

Authority: IC 6-2.5-3-1 et seq

Taxpayer protested the imposition of a use tax on tangible personal property destined for use outside Indiana.

IV. Demurrage

Authority: IC 6-2.5-4-10, 45 IAC 2.2-4-27(d)

Taxpayer protested the proposed assessment of sales tax on gas cylinder demurrage charges.

V. Food

Authority: IC 6-2.5-5-20

Taxpayer protest the proposed assessment of sales/use tax on the purchase of Gatorade for its employees.

VI. Production Equipment

Authority: IC 6-2.5-5-3

Taxpayer protested the proposed assessment on purchases of capital goods used in the production process.

VII. Tangible personal property used to transport goods between work stations, electrical distribution, replacement parts and consumables

Authority: IC 6-2.5-5-3, IC 6-2.5-5-5.1, 45 IAC 2.2-5-8

Taxpayer protested the proposed assessment on the purchase of tangible personal property used in production.

VIII. Environmental Control Purchases

Authority: IC 6-2.5-5-30

Taxpayer protested the proposed assessment on tangible personal property purchased for the purpose of compliance with U.S. EPA requirements.

IX. Penalty

Authority: IC 6-8.1-10-2.1

Taxpayer protested the assessment of a ten percent (10%) penalty.

STATEMENT OF FACTS

Taxpayer is a processor of ferrous and non-ferrous scrap metals with multiple plants in Indiana. In short, taxpayer is in the recycling business. The scrap is subjected to sorting, cutting, shredding, mixing, packaging, a myriad of operation, depending on the needs of the customer. Further, the various operational steps may take place at more than one site or plant. That is to say, the product may be moved while in process from one site to another in motor vehicles over the highways and streets. In any given plant the scrape is moved by cranes, buckets, pallets and conveyors.

Taxpayer does not hold a direct pay permit (IC 6-2.5-8-9) but does self assesses sales/use tax and remits the tax with its monthly sales tax return. For this audit, the taxpayer and Department agreed to take a sample of purchases and to project said sample ratio over the audit period. Taxpayer seeks relief from some assessments as being exempt from the sales/use tax thus an alteration in the projection ratio and the final proposed assessment.

I. Credit for payment of sales tax

DISCUSSION

This issue concerns the purchase of tangible personal property viz trailer body units, dump trailers and trucks. When said vehicles and trailers were registered and plated by the Bureau of Motor Vehicles (BMV), taxpayer claims to have paid the sales/use tax to the BMV. This is a normal transaction as the BMV requires proof of sales tax paid or the applicant must pay. In any event such a claim is easily verified.

FINDING

The taxpayer's protest is sustained to the extent payment of same is verified in a supplemental audit.

II. Imposition of tax on the sale of tangible personal property

DISCUSSION

Here taxpayer alleges that the proposed assessment of sales/use tax on the custom art work was in point of fact a purchase of service as opposed to the purchase of tangible personal property citing 45 IAC 2.2-4-2(a). This regulation addresses the factors or element of a rendition of a service or the transfer of tangible personal property. Taxpayer fails to allege any facts or offer evidence that the subject transaction fits within 45 IAC 2.2-4-2. The Department must point out

that IC 6-8.1-5-1(b) provides in part:

The notice of proposed assessment is prima facie evidence that the proposed department's claim for the unpaid tax is valid.

The Code then states that taxpayer has the burden of persuasion that the proposed assessment is wrong. Taxpayer's argument fails to meet the burden required.

FINDING

Taxpayer's protest is denied.

III. Promotion material stored in Indiana for distribution outside Indiana

DISCUSSION

Taxpayer points out the statutory definition of "storage", IC 6-2.5-3-1(b) and recent court opinions. The taxpayer has shown that its use of the property in Indiana does not exceed "storage".

FINDING

Taxpayer's protest is sustained to the extent out of state delivery is verified by audit.

IV. Demurrage

DISCUSSION

As a part of taxpayer's business it must purchase industrial gases for welding, cutting etc. These gases come in pressurized cylinders or containers. Taxpayer did not recite the exact conditions surrounding the cylinders except to say that the subject charges are characterized as demurrage and are billed separately from the initial transactions.

The word demurrage is generally understood as the charge a carrier makes for the detention of a cargo conveyance. It only makes sense that should a carrier be deprived of his conveyance beyond a bargained for time he be compensated. Or in this case, the gas vendor does not have the use of his cylinder beyond some preagreed date and taxpayer is charged. Of course it would be billed separate as at the time of the sale of the cylinder contents no one would know if the cylinder return would be late. The taxpayer has not bargained for a rental of the cylinder. The fee is being charged for late return of the cylinder and not in exchange for use of cylinders.

FINDING

Taxpayer's protest is sustained.

V. Food

FINDING

Taxpayer's protest is sustained as Gatorade is listed as non-taxable in Sales Tax Information Bulletin #29.

VI. Production Equipment

Taxpayer argues relief from the proposed assessment based upon IC 6-2.5-5-3. Examples of purchases made are:

- Compactor boxes
- Copper furnace cable
- Automobile shredder
- Compactor
- Compactor framing
- Pneumatic life truck

of fixed assets and

- Belts
- Bits
- Brushes
- Bolts

of expense items.

Some of these purchases were made and the sales tax was paid creating a credit, so to speak, in terms of the projection ratio. The essence of the protest is that such payment was not recognized in the audit calculations. Suffice it to say the taxpayer's brief did not detail exactly how each purchase relates to the integrated production process but the parameters of such an exemption have been well defined by the court. Thus it would seem taxpayer and the Department can reach an equitable accord as a result of a supplemental audit.

FINDING

The taxpayer is sustained to the extent its allegations are proven in a supplemental audit on this issue.

VII. Tangible personal property used to transport goods between work stations, electrical distribution, replacement parts and consumables and safety equipment

DISCUSSION

For purpose of this Letter of Finding several taxpayer arguments have been merged. These arguments are identified in the August 15, 1997 brief as Arg # VII, VIII, IX, XI and XIII. See the discussion under Issue VI and the associated Finding for disposition.

VIII. Environmental Control

DISCUSSION

Taxpayer cites as authority for relief IC 6-2.5-5-30. The taxpayer listed the purchases:

Skid & Containment Tanks
Booms
Pumper

and has shown the purchases relate to satisfy U.S. EPA requirements.

FINDING

Taxpayer's protest is sustained.

IX. Penalty

DISCUSSION

If taxpayer had a colorable claim for the exemption from a sale/use tax, then taxpayer has demonstrated reasonable cause for relief. In this dispute it seems that taxpayer's claim is a least colorable in those issues where the Department has sustained the protest.

FINDING

Taxpayer's prayer for a penalty waiver is granted for those issues wherein its protest has been sustained.